**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN, JAIPUR BENCH JAIPUR.**

**KESHAV DEV & ORS. VS. THE STATE OF RAJASTHAN**

**S.B. CRIMINAL MISCELLANEOUS BAIL APPLICATION NO.1242 OF 2005 UNDER SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE.**

**DATE OF ORDER ::: MAY 19, 2005.**

**PRESENT**

**HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN**

Mr. M.K. Kaushik, for the petitioners
Mr. Mohd. Rafiq, Addl. Advocate General.
Mr. R.P. Kuldep, Public Prosecutor
Mr. S.K. Gupta }
Mr. N.C. Chaudhary } as Intervenor.
Mr. J.K. Singhi }

**By the Court :**

1. The point involved in the present case is as to whether clause (i) of proviso (a) to Section 167 (2) or clause (ii) of proviso (a) to Section 167 (2) Cr.P.C., will be applicable for the offence under Section 304-B IPC?.

2. The accused-petitioners have filed this application for bail under Section 439 Cr.P.C., in FIR No.710/2004,

registered at Police Station, Nadbai, District Bharatpur under Sections 498-A and 304-B IPC.

3. The learned counsel for the petitioners contended that the accused-petitioners were arrested on 17.11.2004 and no challan was filed within a period of 60 days. Even after completion of 75 days from the date of their arrest when charge-sheet was not filed then they moved an application for bail under Section 167(2) Cr.P.C., before the Sessions Judge, Bharatpur. The Sessions Judge, Bharatpur, vide its order dated 18.02.2005, rejected the bail application of the petitioners by mentioning the reason that the offence under Section 304-B IPC is punishable up to the sentence of imprisonment of life, therefore, the time limit for filing the charge-sheet is 90 days and as such the provisions of sub-Section (2) of Section 167 Cr.P.C. are not applicable in the present case. He relied upon the judgment of this Court in the case of Kamlesh Vs. State of Rajasthan, reported in 2003 (1) WLC 227.

4. The learned counsel for the petitioners has contended that offence under Section 304-B IPC is punishable with an imprisonment of not less than 7 years but which may extend to imprisonment for life. The minimum sentence of 10 years is not provided under Section 304-B IPC. Therefore, the period of 60 days will be applicable for the purpose of filing the charge-sheet and not the

period of 90 days which is applicable only in the cases where the offence is punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. His contention is that period of 90 days as provided in clause (i) of proviso (a) to sub-Section (2) of Section 167 Cr.P.C., is applicable only where the offence is punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years. He submits that imprisonment for a term of “not less than 10 years” is not prescribed under Section 304-B IPC, therefore, the petitioners should be released on bail under sub-Section (2) of Section 167 Cr.P.C., as investigation was not completed and charge-sheet was not filed within a period of 60 days in the present case. He further submits that the case of Kamlesh Vs. State (Supra) relied upon by the Sessions Judge, Bharatpur is not applicable in the present case as there was no discussion in the said case as to what period, whether 60 days or 90 days, will be applicable for filing charge-sheet in the cases relating to an offence under Section 304-B IPC. In the said case, this Court, presumed that period of 90 days is applicable for the offence under Section 304-B IPC, therefore, the case of Kamlesh Vs. State of Rajasthan is not an authoritative pronouncement on the point.

5. Mr. Kaushik, learned counsel for the petitioners has placed reliance upon Ameer Vs. State of Karnataka (2004

Cr.L.J. 4794), Nadeem Ahmed Vs. State (2004 Cr.L.J. 4798), Sunil Kumar Vs. State of Jharkhand (2002 Cr.L.J. 2507), Rajiv Choudhary Vs.State (NCT) of Delhi (AIR 2001 SC 2369), Hari Kishan Vs. State of Rajasthan (2005 (1) RCC 282), Siya Ram Vs. State of Rajasthan (2000 Cr.L.J.) (RAJ) 438), and Babu Vs. State of Karnataka (1998 Cr.L.J. 16).

6. Mr. Mohd. Rafiq, learned Addl. Advocate General countered the above arguments advanced on behalf of the petitioners by contending that under Clause (i) of proviso (a) to Section 167 (2) CR.P.C., the Legislature has used the word “Punishable”. Therefore, the upper limit of punishment provided for the offence in the Indian Penal Code should be treated as relevant punishment for the purpose of countering the period of 90 days or the 60 days, as the case may be for the purpose of filing the charge-sheet. He has submitted that the Code of Criminal Procedure was amended in 1978 and the object of the amendment was to give more time for completion of investigation to the Investigating Agency in serious offences. The period of 60 days was extended to the period of 90 days where the offence is punishable with death or imprisonment for life or imprisonment for a term of not less than 10 years. He has referred Batna Ram Vs. State of Himachal Pradesh (1980 Cr.L.J. 748), which is based on the judgment of the Hon'ble Supreme Court in the case of Natabar Parida

Vs. State of Orrissa (AIR 1975 SC 1465), wherein objects and reasons for amendment made in 1978 in Cr.P.C. have been considered.

7. The learned Addl. Advocate General has further contended that the statute has to be read as a whole and the legislature history etc., is also to be taken into consideration while interpreting the statutory provisions. He has placed reliance upon Bhavnagar University Vs. Palitana Sugar Mills (P) Ltd., & Ors (2003) 2 SCC 111), Haryana Financial Corp. Vs. Jagdamba Oil Mills (2002 3 SCC 496), Balram Kumawat Vs. Union of India (2003) 7 SCC 628), Gujarat Assembly Election Matter, in Re (2002) 8 SCC 237) and Union of India Vs. Elphinsone Spinning and Weaving Co. Ltd., & Ors. {(2001) 1 SCC 139).

8. Mr. S.K. Gupta, Advocate has contended that in the offence under Section 304-B IPC, the punishment is up to imprisonment for life, therefore, period of 90 days as provided in clause (i) of proviso (a) to Section 167 (2) Cr.P.C., will be applicable. He has referred Section 53 IPC wherein three types of punishments have been provided. He has placed reliance upon Mohan Singh Vs. State of Rajasthan {RLW 1998 (1) Raj. 457}, Basanti Lal Mathur & 2 Ors. Vs. State of Raj. {1997 ( Supp.) RCC 406} and one unreported judgment in Heera Lal Vs. State of Raj. in S.B. Criminal Misc. Iind Bail

Application No.4460/2004, decided on 10.02.2005 at Principal Bench at Jodhpur of this Court.

9 Mr. N.C. Choudhary, Advocate has submitted that the period of 90 days for the purpose of sub-Section (2) of Section 167 Cr.P.C. will be applicable only where punishment is specifically provided as death or imprisonment for life or imprisonment for a term not less than 10 years. His contention is that under Section 304-B IPC, the minimum sentence of 10 years is not provided, therefore, the period of 60 days will be applied for the purposes of sub-Section (2) of Section 167 Cr.P.C.

10. Mr. J.K. Singhi, Advocate has contended that bail is rule and refusal of bail is exception, therefore, the provisions of sub-section (2) of Section 167 Cr.P.C., should be construed in such a manner so as to give benefit to the accused for the purpose of releasing him on bail. He further submits that the provisions of sub-section (2) of Section 167 Cr.P.C. should be construed by keeping in mind the provisions of Article 21 of the Constitution of India.

11. I have heard learned counsel for the petitioners, learned Addl. Advocate General and other advocates who have assisted the Court to decide legal question involved in the present case.

12. For ready reference, Section 167 Cr.P.C., and Section 304-B IPC are reproduced as under :-

> “167. Procedure when investigation cannot be completed in twenty four hours
>
> (1) XXX XXX XXX XXX
>
> (2) The Magistrate to whom an accused person is forwarded under this Section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:
>
> **PROVIDED THAT, -**
>
> (a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period existing.
>
> (1) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years.
>
> (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said

period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail under this sub-section shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under thus sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

(b) XXX XXX XXX XXX”

**“304-B. Dowry Death.-** (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or nay relative of her husband for, or in connection with, any demand for dowry, such death shall be called `dowry death', and such husband or relative shall be deemed to have caused her death.

**Explanation.-** For the purpose of this sub-section, `dowry' shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life”.

13. In Ameer Vs. State of Karnataka (Supra), the accused was charged for the offence punishable under Sections 366-A, 342 and 376 I.P.C.. The Court took a view that where the imprisonment may extend to life, the Court may impose imprisonment for life or even lesser sentence. Hence Section 167 (2) (a) (ii) Cr.P.C.

applies.

14. In Nadeem Ahmed Vs. State (Supra), the same view was taken which was taken in the case of Ameer Vs. State of Karnataka as both the cases were decided on the same day by the same Judge.

15. In Rajiv Choudhary Vs. State (NCT) of Delhi (supra) the Hon'ble Supreme Court considered the provisions of clause (i) of proviso (a) to Section 167 (2) Cr.P.C., with reference to offence under Section 386 IPC wherein the punishment provided is with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine. The Hon'ble Supreme Court held that the expression “not less than” would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under Section 386 IPC, punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. The Hon'ble Supreme Court held that the offence punishable under Section 386 IPC would not cover under Clause (i) of proviso (a) to Section 167 (2) Cr.P.C.

16. In Kamlesh Vs. State (Supra), in para No.7, it was observed as under:-

> “In the instant case, as already stated, the accused-petitioner was arrested on April 28, 2002 and the charge-sheet was filed in the Court of July 26, 2002. Thus, it is clear that the charge-sheet against the accused-petitioner had been filed within 90 days from the date of his arrest. As the investigation related to an offence u/s.304-B IPC also which is punishable with imprisonment for life and, therefore, the period prescribed for completion of the investigation under sub-section (2) of Section 167 of the Code was 90 days”.

17. In Mohan Singh Vs. State of Raj. (Supra), this Court held that in the offence u/s. 306 IPC, the Court is empowered to pass sentence of 10 years also. Therefore, Section 167 (2) (a) (i) Cr.P.C. is applicable. However, this view is impliedly over-ruled in view of judgment of the Hon'ble Supreme Court in the case of Rajiv Choudhary Vs. State of Delhi.

18. In Basanti Lal Mathur Vs. State of Rajasthan (supra), this Court was considering a bail application in respect of the offence under Sections 467, 468, 471 and 120-B IPC. The bail application was filed on the ground that the challan has not been submitted within a period of 60 days from the date of arrest of the accused, therefore, he is entitled for bail under Section 167 (2) Cr.P.C. This Court did not allow the

bail application by observing that period for submitting challan would be 90 days in the offence under Section 467 IPC.

19 In Harikishan Vs. State (Supra), this Court allowed the bail to accused under Section 167 (2) Cr.P.C. in respect of the offence under Section 498-A and 306 IPC by observing that the challan has not been filed within a period of 60 days.

20. In Babu Vs. State of Karnataka (supra), it was held that for the offence under Section 306 IPC wherein maximum punishment prescribed is 10 years and not beyond, charge-sheet ought to have been filed within 60 days.

21. In Mohd. Arif Din Mohd. Shaikh Vs. State of Maharashtra (1999 Cr.L.J. 2645), it was held that for the offence under Section 307 IPC, the provisions of Section 167 (2) (a) (i) would be applicable and the period of filing charge-sheet was held to be 90 days.

22. In Dilip Ojha Vs. State of Bihar (2001 Cr.L.J. 1352), the Court was considering the provision of Section 167 (2) Cr.P.C. with reference to offence under Sections 386, 379, 411 and 414 IPC and it was held that maximum punishment for the offence committed by the accused under Section 386 IPC is “up to 10 years” and not for

the term “not less than 10 years”. It was held that the period of detention permissible under Section 167 (2) (a) Cr.P.C. would be 60 days and not 90 days.

23. Before amendment made in 1978 by the Act No.45 of 1978 in the Code of Criminal Procedure, the total period for filing charge-sheet was 60 days. However, by way of amendment made in 1978, by amending the proviso (a), the Magistrate has been empowered to authorise detention, pending investigation for a period of 90 days in cases where investigation relates to offence punishable with death or imprisonment for life or imprisonment for not less 10 years or more and up to 60 days in any other case. This amendment was intended to remove difficulties which have been actually experienced in relation to the investigation of offence of a serious nature.

24. In Batna Ram Vs. State of U.P. (Supra), the Division Bench of Himachal Pradesh High Court considered the amended provisions of Section 167 (2) Cr.P.C. and held that the necessity to amend the proviso arose because in some heinous cases of extraordinary complexity, it was not possible for the police to complete the investigation within 60 days and the accused had to be released on bail on the expiry of 60 days of detention authorised by the Magistrate. Paras Nos. 7 and 12 of the judgment are reproduced as under:-

“7. The necessity to amend the proviso arose because in some heinous cases of extraordinary complexity, it was not possible for the police to complete the investigation within sixty days and the accused had to be released on bail on the expiry of 60 days of detention authroised by the Magistrate. The Supreme Court in AIR 1975 SC 1465, Natabar Parida Vs. State of Orrisa, remarked: `if it is not possible to complete the investigation within a period of 60 days, then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such law may be a “paradise for the criminals”, but surely it would not be so, as it is sometimes supposed to be, because of the Courts. It would be so under the command of the Legislature.”

“12. We are fortified in our conclusion by the `Notes on Clauses' circulated with the Code of Criminal Procedure (Amendment) Bill, 1978 (Bill NO.92 of 1978). Clause 13, relating to proposed amendment on Section 167, is in the following terms:

Section 167 is being amended to empower the Magistrate to autorise detention, pending investigation, <u>for an aggregate period of 90 days</u> in case where the investigation relates to offences punishable with death, imprisonment for life or imprisonment for not less than ten years and up to 60 days in any other case. These amendments are intended to remove difficulties which have been actually experienced in relation to the investigation of offences of a serious nature”.

25. In Bhavnagar University Vs. Palitana Sugar Mills (P) Ltd., & Ors. (supra), the Hon'ble Supreme Court had

held as under:-

> “A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.”

26. In Haryana Financial Corporation Vs. Jagdamba Oil Mills (supra), the Hon'ble Supreme Court has held as under:-

> “Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judge interpret statutes, they do not interpret judgments. They interpret word of statutes, their words are not to be interpreted as statutes.”

27. In Gujarat Assembly Election Matter, in re (supra), the Hon'ble Supreme Court held that one of the known methods to discern the intention behind enacting a

provision of the Constitution and also to interpret the same is to look into the historical legislature developments, Constituent Assembly Debates or any enactment preceding the enactment of the constitutional provision.

28. In Delhi Administration Vs. Manohar Lal (2002 7 SCC 222), it was held in para No.5 of the judgment that the High Court and another Courts in the country were no doubt ordained to follow and apply the law declared by this Court, but that does not absolve them of the obligation and responsibility to find out the ratio of the decision and ascertain the law, if any, so declared from a careful reading of the decision concerned and only thereafter proceed to apply it appropriately, to the cases before them.

29. In Rajiv Choudhary Vs. State of Delhi (Supra), the Hon'ble Supreme Court was considering the provisions of Section 167 Cr.P.C. with reference to offence punishable under Section 386 IPC. A little difference in facts or additional facts may make a lot difference in the precedential value of a decision. The Hon'ble Supreme Court considered the offence which was punishable up to 10 years only and not the case of present nature wherein the minimum imprisonment is seven years but which may be extended up to imprisonment for life. Therefore, the case of Rajiv

Choudhary is not strictly applicable in the present case.

30. In Heera Lal Vs. State of Rajasthan (supra), this Court considered the provisions of Section 167 (2) CR.P.C. with reference to offence punishable under Section 8/158 of the NDPS Act, 1985. This Court referred the judgment given by the Hon'ble Supreme Court in the case of Rajiv Choudhary Vs. State of Delhi. The provisions of Section 36-A (4) of the NDPS Act was also taken into consideration. It was found that offence under Section 8/15 of the Act was not covered by sub-section (4) of Section 36-A of the Act of 1985 and in that particular case it was held that period of 60 days was applicable and in that circumstances, the bail was allowed to the accused under Section 167 (2) Cr.P.C.

31. The Hon'ble Supreme Court, in the case of Rajiv Choudhary Vs. State of Delhi, was considering the offence under Section 386 IPC wherein maximum sentence of imprisonment prescribed was 10 years, therefore, it was held that clause (ii) of proviso (a) to Section 167 (2) Cr.P.C. would be applicable. It was held that under Section 386 IPC, imprisonment can derive from minimum to maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years. However, so far as the present case is

concerned, the offence under Section 304-B IPC wherein the minimum sentence of seven years is prescribed but it may be extended up to imprisonment for life.

31. The above provision clearly shows that the minimum sentence of seven years may be extended to maximum sentence, i.e., imprisonment for life. What should be the adequate punishment is always determined and passed by the courts on the basis of facts and circumstances of each case. The stage of passing of sentence arises only after recording the order of conviction against the accused person. Before 1978, the time limit for all offences for filing of charge-sheet was prescribed as 60 days so that there may not be any misuse by the Investigating Agency with the liberty of a citizen by making delay in filing charge-sheet but after having experienced difficulties, the said clause was amended by substituting proviso (a) to Section 167 (2) Cr.P.C. and in heinous cases where offence is punishable with death, the imprisonment for life or imprisonment for a term of not less than 10 years, the period of 60 days was enhanced to 90 days. The crimes are being increased day-to-day. The police is assigned with other duties of law and order problem in addition investigation of case. The Legislature, while making amendment in NDPS Act, 1985, Section 36-A was inserted w.e.f. 2.10.2001 and as per sub-section (4) of Section 36-A of the NDPS, the

period of 90 days with reference to sub-section (2) of Section 167 was construed as 180 days.

33. The objects and reasons of amendment made in Section 167 (2) Cr.P.C. have been considered in detail by the Division Bench of the Himachal Pradesh High Court in the case of Batna Ram Vs. State of H.P. (supra) and it was observed that the amendment was intended to remove difficulties which have been actually experienced in relation to the investigation of offences of serious nature.

34. In the case of Batna Ram, a reference to judgment of the Hon'ble Supreme Court, in the case of Natabar Parida Vs. State of Orissa, was made wherein it was remarked “if it is not possible to complete the investigation within a period of 60 days, then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such law may be a “paradise for the criminals”, but surely it would not be so, as it is sometimes supposed to be, because of the Courts. It would be so under the command of the Legislature. The Legislature thought it proper to amend proviso (a) of sub-section (2) of Section 167 CR.P.C. and period of 60 days was enhanced to 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years.

35. So far as personal liberty of a citizen guaranteed by Article 21 of the Constitution of India is concerned, the Hon'ble Supreme Court, in Kalyan Chandra Sarkar Vs. Rajesh Ranjan (AIR SCW 536) has observed as under:-

> “It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law”.

36. It is relevant to mention here that person accused of non bailable offences are entitled for bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so.

37. So far as offence under Section 304-B IPC is concerned,

there may be different facts and circumstances of each case. There may be death of woman within two months of her marriage or within seven years of her marriage. There may be death of woman with advance stage of pregnancy. There may be death of a woman where demand of dowry with some more cruelty or regular harassment by her husband or any relative of her husband. Under sub-section (2) of Section 304-B IPC, the punishment has been provided for a term, which is not less than seven years but which may extend to imprisonment for life. Quantum of punishment cannot be ascertained at the stage of investigation of the case because the sentence can only be determined and awarded by the Courts after conclusion of trial of each case and after recording the order of conviction. Therefore, at the stage of investigation, the maximum punishment prescribed for the offence is relevant for the purpose of proviso (a) to Section 167 (2) Cr.P.C. In number of offences, in Indian Penal Code, various types of or alternative punishments have been prescribed. The punishment has been defined under Section 53 of the IPC. The minimum sentence prescribed for an offence is not relevant for the purpose of proviso (a) to Section 167 (2) Cr.P.C. Under Section 396 IPC, the punishment prescribed is death or imprisonment for life or rigorous imprisonment for a term which may extend to 10 years, and shall also be liable to fine. Similarly, under Section 305 IPC, the sentence prescribed is death

or imprisonment for life or imprisonment for a term not exceeding 10 years and shall also be liable to fine. In these offences, sentence of death or imprisonment for life may be and may not be passed and passing of sentence depends on facts and circumstances of each case. In these offences, the imprisonment can be up to ten years also. However, if order sentence prescribed, i.e. death or imprisonment for life is not taken into consideration and only imprisonment for a term not exceeding 10 years, is taken into consideration, then the accused shall have to be released on bail under Section 167 (2) Cr.P.C. if charge-sheet is not filed within a period of 60 days. The word “punishable” has been used in clause (i) of proviso (a) to Section 167 (2) Cr.P.C., which clearly shows that if punishment is up to life imprisonment also, then clause (i) of proviso (a) to Section 167 (2) Cr.P.C., would be attracted.

38. In view of the above discussion, it is clear that the offence under Section 304-B IPC is punishable for imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life, therefore, provisions of clause (i) of proviso (a) to Section 167 (2) Cr.P.C. would be attracted and there is no dispute that in the present case, charge-sheet has been filed within a period of 90 days, therefore, the petitioners are not entitled for bail

under Section 439 read with Section 167 (2) Cr.P.C. Accordingly, the bail application of the petitioners is dismissed.

**(Narendra Kumar Jain )J.**